

A **TMF TRUSTEES MALAYSIA BHD v. OFFSHORE WORKS
SDN BHD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN JC
[SUIT NO: 22NCC-32-01-2014]

B 21 JUNE 2016

C **CONTRACT:** *Assignment – Deed of assignment – Conditions precedent – Conditions for affecting absolute legal assignments – Civil Law Act 1956, s. 4(3) – Whether fulfilled – Whether absolute assignment of right impacts continued operation of conditions precedent clause in facilities agreement – Whether guarantee related security to facilities – Whether lender retained right to obtain guarantee and entitled to enter into guarantee – Whether third defendant could question enforceability of guarantee – Disbursement of facilities – Whether third defendant obtained full benefits of facilities – Whether third defendant could avoid liability under guarantee – Whether plaintiff as ultimate assignee has legal right to debt or chose in action*

E **CONTRACT:** *Guarantee – Validity – Recovery of money due and owing – Whether guarantee related security to facilities in facility agreement and a condition precedent to availability of facility – Assignment of rights – Whether had any effect on conditions precedent to availability of facility – Whether lender had capacity to enter into guarantee – Third defendant acted upon guarantee being a condition to facilities benefited by company – Whether third defendant could question enforceability of guarantee – Disbursement of facilities – Whether third defendant obtained full benefits of facilities – Whether third defendant could avoid liability under guarantee – Whether plaintiff as ultimate assignee has legal right to debt or chose in action by virtue of s. 4(3) of Civil Law Act 1956*

G **CIVIL PROCEDURE:** *Action – Recovery for moneys due and owing – Validity of guarantee – Whether guarantee related security to facilities in facility agreement and a condition precedent to availability of facility – Assignment of rights – Whether had any effect on conditions precedent to availability of facility – Whether lender had capacity to enter into guarantee – Third defendant acted upon guarantee being a condition to facilities benefited by company – Whether third defendant could question enforceability of guarantee – Disbursement of facilities – Whether third defendant obtained full benefits of facilities – Whether third defendant could avoid liability under guarantee – Whether plaintiff as ultimate assignee has legal right to debt or chose in action by virtue of s. 4(3) of Civil Law Act 1956*

I This was the plaintiff's action against the borrower, Offshore Works Sdn Bhd ('the borrower') and the guarantors, the second, third and fourth defendants, for the recovery of the sum of RM33,743,864.58 ('the said sum'). The trial proceeded against the third defendant as the borrower had been wound up whilst the other defendants have been adjudicated bankrupt. The said sum

was the amount outstanding under a term loan facility ('the facility') granted to the borrower on the terms and conditions set out in the facility agreement between Alliance Investment Bank Berhad ('lender') and the borrower ('facility agreement') and guaranteed by, among others, the second, third and fourth defendants under the joint and several guarantee furnished to the lender ('guarantee'). The granting of the facility to the borrower was part of the Collateralised Loan Obligation ('CLO') transaction, carried out by the lender whereby the lender, as the originator, had sold, transferred and assigned to the issuer, herein Idaman Capital, all of its rights, title and interest in the portfolio which comprised of the facility and the other facilities (collectively, 'the portfolio') together with the related security. The borrower entered into the facility agreement with the lender and Idaman Capital. The facility agreement was signed by, among others, the third defendant, a director of the first defendant, on behalf of the borrower. The lender entered into a sale and purchase agreement with Idaman Capital ('sale and purchase agreement') wherein the lender agreed to sell, transfer and assign absolutely all the lender's rights, title and interest under, *inter alia*, the facility together with all related security to Idaman Capital. Following this, Idaman Capital entered into a trust deed with the plaintiff ('trust deed'). Thereafter, Idaman Capital entered into a deed of assignment with the plaintiff ('deed of assignment') wherein pursuant to the terms of the trust deed, Idaman Capital absolutely assigned, *inter alia*, all its present and future rights, titles and interest in and to the receivables and proceeds from, *inter alia*, the facility together with all related security and together with the payment and enforcement rights with respect to, *inter alia*, the facility. The second, third and fourth defendants executed the guarantee with the lender. By a drawing notice, the borrower gave notice to the lender that they wished to make a drawing under the facility in the amount of RM32,000,000 and the third defendant had signed the drawing notice on behalf of the borrower. In accordance with the terms of the facility agreement, the lender disbursed the sum of RM32,000,000 to the borrower. By a letter dated 29 August 2013, the plaintiff demanded from the guarantors, including the third defendant, the payment of the said amount, together with the accruing default interest to the date of actual payment. The guarantors, including the third defendant failed, neglected and refused to pay the amounts demanded or any part thereof. It was the plaintiff's case that the guarantee was valid and enforceable and pursuant thereto, the third defendant was liable to pay the amount outstanding under the facility in the said sum. The plaintiff submitted that as the ultimate assignee, it was entitled to bring this action to enforce, *inter alia*, its rights under the guarantee. According to the plaintiff, the conditions under s. 4(3) of the Civil Law Act 1956 had been fulfilled, thereby passing and transferring the legal right to the monies due and owing by the borrower and the guarantors, including the third defendant, to the plaintiff. The

- A plaintiff submitted that it was entitled to make a demand on the amounts due and owing from the borrower and the guarantors, including the third defendant under the facility agreement and the guarantee respectively and to commence the present action for recovery for the amount due and owing. The third defendant, in opposing the plaintiff's claim, raised these grounds,
- B *inter alia* (i) that the guarantee was void *ab initio* as the lender had no capacity to enter into the guarantee at the material time with the third defendant as the lender had assigned all its rights under the facilities agreement with the borrower; and (ii) that the third defendant should have been released as the guarantor.
- C **Held (allowing plaintiff's claim):**
- (1) The guarantee was the related security to the facilities. Clause 4.1 of the facility agreement laid down the fact that the guarantee is the condition precedent to the availability of the facility. From the reading of cl. 4.1, it does not envisage rights but rather a condition precedent in order for the facilities to be disbursed. When there are conditions precedent to be fulfilled, it is about obligations and not rights. There was a consideration that flowed from the lender as a result of the assignment. The guarantee itself contemplated that the consideration was the disbursement of the facilities to the lender. Once the condition is satisfied, the facilities agreement will allow the issuance of the drawing notice by the borrower and it was proven that after the facilities agreement and the guarantee were signed, the money was disbursed. There was nothing in the facilities agreement to state specifically that there was a right for the lender to get the guarantee but rather the guarantee was a condition precedent. In the event the conditions precedents were not satisfied, no liability arose to either party. (paras 49-53)
- (2) The assignment of rights to Idaman Capital and subsequently to the plaintiff did not have any effect on the conditions precedent to the availability of the facility. The conditions precedent must be satisfied first and it was one of the conditions precedent for the provision of the related security that was the guarantee in favour of the lender. The rights under any particular security only arises upon the provision of the security and not before. The provision of the guarantee was therefore a condition precedent and upon the guarantee provided, rights under the guarantee then would arise. The rights then were assigned finally to the plaintiff. The third defendant could not challenge the capacity of the lender to enter into the guarantee and its validity. The assignments did not impact the operation of the conditions precedent and those conditions precedent were required to be performed and accordingly the lender had the capacity to enter into the guarantee. (paras 56, 58, 60 & 61)

- (3) The defendants including the third defendant knew all along what was going to happen prior to the signing of the agreement, the consequences thereafter, the factual matrix leading to the giving of the guarantee and that the lender's rights under the guarantee would be assigned. All parties knew that there would be a facilities agreement and a sale on the right to facilitate the bond issue and the sale would encompass the security obtained. The third defendant had acted upon the guarantee being a condition to the facilities which the company later had benefited. After signing the guarantee and being in a position of exclusive knowledge as to what had transpired, the third defendant was not in a position to question the enforceability of the guarantee now. He in fact executed resolution which set out the background leading to the borrowing. The consent to the assignment was also given whereby the third defendant undertook to pay the facilities. The third defendant was therefore estopped from challenging the capacity of the lender to enter into the guarantee and contending that the guarantee was invalid. (paras 41, 63 & 65) A B C D
- (4) An absolute assignment of right does not impact the continued operation of the conditions precedent clause. There was no contradiction in the evidence of PW1 when she stated that the lender retained the right to obtain the guarantee since the provision of the guarantee was part of the conditions precedent to the availability of the facility. The guarantee was obtained prior to the closing date of the sale and purchase agreement and therefore, the lender was entitled to enter into the guarantee as the guarantee was part of the conditions precedent to the availability of the facility and therefore, was not a right that was assigned under the sale and purchase agreement and subsequently under the deed of assignment. (para 71) E F
- (5) The plaintiff as the ultimate assignee had the legal right to the debt or chose in action and all legal and other remedies for the same by virtue of s. 4(3) of the Civil Law Act 1956. The issuance of the certificate on monies owing was part and parcel of the remedies held by the plaintiff for enforcing such rights assigned *ie*, the payments of the amount outstanding under the guarantee. Such certificate shifted the burden onto the third defendant to disprove the amount claimed. Further, the borrower under the facility agreement had waived its rights to set off in relation to monies payable under the facility agreement. The borrower had undertaken to pay all monies payable or due to be paid in accordance with the facility agreement without any set off or deduction or any payment to any other party, other than as provided under the terms of the facility agreement or in accordance with the instructions of the plaintiff. (paras 79 & 80) G H I

- A (6) The facility had been disbursed and enjoyed by the borrower. The third defendant was director of the borrower at all material time. After having obtained the full benefit of the facility, the third defendant upheld his bargain by complying with his contractual obligations. The law must lean in favour of upholding bargains and not striking them down. The third defendant could not be allowed to avoid his liability under the guarantee. He was obliged to honour the guarantee as well as his direct undertaking in the letter to the plaintiff to pay as instructed by the plaintiff. (paras 73 & 83)
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Case(s) referred to:

- C *Amalgamated Property Co v. Texas Bank* [1982] 1 QB 84 (*refd*)
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC (*refd*)
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC (*refd*)
Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC (*refd*)
- D *Sarah Sayeed Majangah & Anor v. Lembaga Getah Malaysia & Anor* [2016] 2 CLJ 905 CA (*refd*)
UMW Industries (1985) Sdn Bhd (Formerly UMW (Malaya) Sdn Bhd) v. Ah Fook @ Chin Kim Fook [1996] 1 CLJ 379 FC (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Other source(s) referred to:

Anson's Law of Contract, 27th edn, pp 133, 134, 135
Sir Kim Lewison, *The Interpretation of Contracts*, 5th edn, p 725
Treital, *The Law of Contract*, 11th edn, p 672

- F *For the plaintiff - John Mathew & Teng Chong Moi; M/s Christopher & Lee Ong*
For the defendant - A Onn; M/s Onn & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Noorin Badaruddin JC:

- H [1] This is the plaintiff's action against the borrower, Offshore Works Sdn Bhd ("the borrower") and the guarantors, the second, third and fourth defendants, for the recovery of the sum of RM33,743,864.58 ("the said sum") as at 30 April 2013, interest thereon at the rate of 11.15% per annum on the said sum from 1 May 2013 to date of full payment and costs.

- I [2] The trial proceeded against the third defendant as the borrower has been wound up whilst the second and third defendants have been adjudicated bankrupt.

[3] The said sum is the amount outstanding as at 30 April 2013 under a term loan facility of up to a maximum aggregate principal amount of RM32,000,000 (“the facility”) granted to the borrower on the terms and conditions set out in the facility agreement dated 19 September 2006 between Alliance Investment Bank Berhad (“lender”) and the borrower (“facility agreement”) and guaranteed by, among others, the second, third and the fourth defendants under the Joint and Several Guarantee dated 3 October 2006 furnished to the lender (“guarantee”).

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[4] The plaintiff commenced this action acting as the assignee ultimately entitled to the rights of the lender under the facility agreement and the guarantee.

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[5] During the trial, the plaintiff called five witnesses and the third defendant himself testified as “DW1”.

Background Facts

[6] The plaintiff is a company incorporated in Malaysia and registered under the Trust Companies Act 1949 having its place of business at 10th Floor, Menara Hap Seng, No. 1 & 3, Jalan P Ramlee, 50250 Kuala Lumpur (hereinafter referred to as “the trustee”).

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[7] The first defendant is a company incorporated in Malaysia having its place of business at 15th Floor, Bangunan Getah Asli (Menara), 148 Jalan Ampang, 50450 Kuala Lumpur (hereinafter referred to as “the borrower”).

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[8] The second defendant is a Malaysian citizen with a last known address of No. 16 Jalan 1/4, Taman Tun Abdul Razak, 68000 Ampang, Selangor Darul Ehsan.

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[9] The third defendant is a Malaysian citizen with a last known address of No. 67, Jalan Pimping Kiri, 68000 Ampang, Selangor Darul Ehsan.

[10] The fourth defendant is a Malaysian citizen with a last known address of 9-1-3, Sri Kenangan, Section 6, Wangsa Maju, Setapak, 53300 Kuala Lumpur.

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[11] At the request of the borrower, the lender agreed to make available the facility to the borrower.

[12] The granting of the facility to the borrower is part of the Collateralised Loan Obligation (“CLO”) transaction carried out by the lender. In addition to the facility to the borrower, the lender also agreed to make available loan facilities to certain other companies respectively (“other facilities”) upon the terms and subject to conditions contained in the relevant facility agreements (“the other facility agreements”) respectively. Under the CLO Transaction:

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- (a) the lender, as the originator will sell, transfer and assign to the issuer, herein Idaman Capital, all of its rights, title and interest in the portfolio which comprises of the facility and the other facilities (collectively, “the portfolio”) together with the related security;

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- A (b) Idaman Capital, a special purpose company specially incorporated, will then issue bonds, comprising of Super Senior Bonds, Senior Bonds, Mezzanine Bonds and the Subordinated Bonds (collectively, “the bonds”) to fund the purchase of the portfolio from the lender;
- B (c) the bonds will be issued to various bondholders;
- (d) to secure the interests of the bondholders, Idaman Capital in turn will assign all its rights, title and interest in and to the portfolio together with the related security to the trustee (plaintiff).
- C [13] On 19 September 2006, the borrower entered into the facility agreement with the lender and Idaman Capital. The facility agreement, was signed by, among others, the third defendant, a director of the first defendant, on behalf of the borrower.
- [14] By the facility agreement, the borrower, agreed, among others:
- D (a) (i) That the facility shall become available to the borrower on the date the lender has received the documents and evidence listed in Schedule 3 thereof, in each case in the form and content satisfactory to the lender. This is set out in cl. 4.1 of the facility agreement, under the heading “Conditions Precedent”;
- E (ii) Schedule 3 in turn itemises the conditions precedents to be satisfied for the availability of the facility. In that regard, Item 1 of Schedule 3 provides for the execution of the facility agreement and the security documents in relation on the related security, which is the guarantee;
- F (b) (i) That upon issuance of the bonds, to subscribe for the balance of the Subordinated Bonds limited to 10% of the principal amount of the facility;
- (ii) That the subscription amount for the Subordinated Bonds to be subscribed by the borrower, be deducted from the advance to be made by the lender;
- G (c) (i) To pay an upfront amount of 1.75% of the advance (“upfront payment”) for the purposes as set out in cl. 14.3 of the facility agreement. The upfront amount was RM560,000;
- H (ii) That the upfront payment be deducted from the advance to be made by the lender:
- (d) That the facility is for a period of five years;
- (e) To repay the facility in the following manner;
- I (i) 5% of the advance at the end of three years from the date of the advance. This represents an amount of RM1,600,000;

- (ii) 5% of the advance at the end of four years from the date of the advance. This again represents an amount of RM1,600,000; A
- (iii) the balance 90% of the advance at the end of five years from the date of the advance;
- (f) Pay interest: B
- (i) At the rate of 8.15% per annum ("the prescribed rate");
- (ii) Default interest at the rate of 3% above the prescribed rate.
- [15] On 19 September 2006, the lender entered into a sale and purchase agreement with Idaman Capital ("sale and purchase agreement") wherein the lender agreed to sell, transfer and assign absolutely all the lender's rights, title and interest in and to the receivables and proceeds under, *inter alia*, the facility together with all related security to Idaman Capital. C
- [16] (a) the lender, by a letter to the borrower dated 19 September 2006, notified the borrower that pursuant to the sale and purchase agreement, the lender has sold, transferred and assigned absolutely to Idaman Capital all of the lender's rights, title and interest in and to the facility agreement and all related security, including without limitation, all amounts payable to the lender under the facility agreement ("notice of assignment from the lender to the borrower"); D
- (b) the borrower was also notified that all payments due under the facility agreement shall be made directly to a designated account of Idaman Capital or as otherwise instructed by Idaman Capital; E
- (c) the borrower acknowledged receipt of the notice of assignment from the lender to the borrower and agreed to act in accordance with all the instructions contained therein. F
- [17] Following the entry of the sale and purchase agreement, Idaman Capital entered into a trust deed with the plaintiff dated 19 September 2006 ("trust deed"). The plaintiff is a trust company. G
- [18] Thereafter Idaman Capital entered into a deed of assignment with the plaintiff dated 19 September 2006 ("deed of assignment") wherein pursuant to the terms of the trust deed and for the purpose of better securing the performance of Idaman Capital's obligations under the trust deed, Idaman Capital absolutely assigned, *inter alia*, all its present and future rights, titles and interest in and to the receivables and proceeds from, *inter alia*, the facility together with all related security and together with the payment and enforcement rights with respect to, *inter alia*, the facility. H
- [19] (a) Idaman Capital, by a letter dated 19 September 2006 to the borrower, informed the borrower of the deed of assignment under which Idaman Capital had assigned to the plaintiff, *inter alia*, I

- A all their present and future rights, title, benefits and interest in and to the facility agreement (“notice of assignment from Idaman Capital to the borrower”);
- (b) the borrower was also notified that any money payable or due to Idaman Capital be paid to the designated account of Idaman Capital or in accordance with the instructions of the plaintiff;
- B (c) the borrower, by a letter dated 19 September 2006 to the plaintiff consented to the assignment of all of Idaman Capital’s present and future rights, title, benefits and interests in and to the facility agreement including all rights to amount from time to time payable or accruing to Idaman to the plaintiff.
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[20] On 3 October 2006, among others, the second, third and the fourth defendants executed the guarantee with the lender.

- D [21] (a) the lender, by letter dated 3 October 2006, notified, among others, the third defendant that pursuant to the sale and purchase agreement, the lender sold, transferred and assigned absolutely to Idaman Capital all of the lender’s rights, title and interest in and to the facility agreement and all related security (namely, in respect of this notice, the guarantee), including without limitation, all amount payable to the lender under the facility agreement;
- E (b) the third defendant, amongst others, was notified that payments due under the facility agreement and the related security (namely, the guarantee) shall be made directly to a designated account of Idaman Capital or as otherwise instructed by Idaman Capital;
- F (c) the third defendant, amongst others, acknowledged receipt of the notice of the assignment and agreed to act in accordance with all the instructions contained in the said notice of assignment.

- G [22] (a) Idaman Capital subsequently, by letter dated 3 October 2006 notified, among others, the third defendant of the deed of assignment under which Idaman Capital assigned all their present and future rights, title, benefit and interest in and to the guarantee including all rights to amount from time to time and at any time payable to Idaman Capital to the plaintiff;
- H (b) the third defendant, amongst others, was also notified that any money payable or due to Idaman Capital be paid to the designated account of Idaman Capital without any set-off or deduction or payment to any other party than as provided under the terms of the guarantee or in accordance with the instructions of the plaintiff;
- I (c) the third defendant, amongst others, by a letter dated 3 October 2006 consented to the assignment of the guarantee to the plaintiff. By this letter, among others, the third defendant unconditionally consented, acknowledged and confirmed, among others, that:

- (i) he undertook to pay all monies payable or due to be paid to Idaman Capital in accordance with the guarantee to the designated account of Idaman Capital without any set-off or deduction or payment to any other party, other than as provided under the terms of the guarantee or in accordance with the instructions of the plaintiff, if the plaintiff notifies in writing.

[23] By a drawing notice dated 4 October 2006 (“drawing notice”), the borrower gave notice to the lender that they wished to make a drawing under the facility in the amount of RM32,000,000. The third defendant signed the drawing notice on behalf of the borrower. By the drawing notice, the borrower, among others:

- (a) requested the lender to remit the drawing of RM32,000,000 or such lesser amount as may be advanced by the lender under the facility in accordance with the facility agreement to their account with Bumiputra Commerce Bank Berhad, Account No. 1408-11991110-52;
- (b) confirmed, among others, that the conditions contained in cl. 4.1 of the facility agreement (which are the conditions precedent to the availability of the facility, which would include the execution of the guarantee) are satisfied as at the date of the drawing notice.

[24] Idaman Capital issued the bonds on 10 October 2006. The bonds were issued pursuant to the trust deed.

[25] Pursuant to the facility agreement and in accordance with the terms of the facility agreement, the lender disbursed the sum of RM32,000,000 to the borrower, in the following manner:

- (a) RM32,000,000 towards subscription by the borrower of the Subordinated Bonds issued by Idaman Capital and deducted from the facility;
- (b) RM560,000 being the upfront payment to be paid by the borrower and deducted from the facility;
- (c) the balance of RM28,240,000, after taking into account the above, was directly disbursed into the account of the borrower, No. 1408-11991110-52 with CIMB Bank Berhad (then known as Bumiputra Commerce Bank Berhad).

[26] By a letter dated 19 January 2007, Messrs Zul Rafique & Partners, delivered the documents, comprising of, among others, the facility agreement, the guarantee, drawing notice, documents in relation to the deed of assignment and the sale and purchase agreement to the borrower.

- A [27] The borrower made the following repayments to the plaintiff:
- (a) the first repayment of 5% of the facility of RM32,000,000, which came to, RM1,600,000;
 - (b) the second repayment of 5% of the facility of RM32,000,000, which also came to, RM1,600,000.
- B [28] The borrower also, paid three instalment payments of RM608,000 each, totalling RM1,824,000. These payments were part of six instalment payments agreed to be made by the borrower to the plaintiff for the proposed release of the third defendant from the guarantee, which proposed release was
- C subsequently not pursued by the borrower and the borrower requested that these three payments be treated as payment towards reducing the principal outstanding under the facility.
- D [29] The entire facility was to be repaid on 5 October 2011. Notwithstanding the letter from HSBC to the borrower dated 20 September 2011, the borrower did not pay the total amount due as at 5 October 2011 of RM28,072,260.30 which comprised of the principal outstanding of RM26,976,000 and interest of RM1,096,260.30.
- [30] By:
- E (a) a letter dated 6 November 2012, the plaintiff demanded from the borrower the payment of the principal outstanding and interest, totalling RM28,072,260.30 together with late interest charges. Notwithstanding this letter, the borrower did not pay the said sum demanded;
- F (b) a letter, also dated 6 November 2011, the plaintiff demanded from the guarantors, including the third defendant, the principal outstanding and interest, totalling RM28,072,260.30 together with late interest charges. Notwithstanding this letter, the guarantors including the third defendant did not pay the said sum demanded.
- G [31] By:
- H (a) a letter dated 7 August 2013, the solicitors for the plaintiff demanded from the borrower payment of the amount due under the facility as at 30 April 2013, being RM33,743,864.58 (which is inclusive of the outstanding principal amount of RM26,976,000) together with default interest accruing thereon at the rate of 11.15% per annum up to the date of actual payment. The borrower failed, to pay the amount demanded;
- I (b) a letter dated 29 August 2013, the solicitors for the plaintiff demanded from the guarantors, including the third defendant, the payment of the amount referred to above, together with the accruing default interest to date of actual payment. The guarantors, including the third defendant failed, neglected and/or refused to pay the amounts demanded or any part thereof.

Plaintiff's Case

[32] It was the plaintiff's case that the guarantee is valid and enforceable and pursuant thereto, the third defendant is liable to pay the amount outstanding under the facility in the said sum which is inclusive of the outstanding principal amount of RM26,976,000 as at 30 April 2013 together with default interest at the rate of 11.5% per annum from 1 May 2013 to the date of full settlement. In that regard, the plaintiff highlighted that the guarantee also stipulates that the guarantors are deemed to be liable for the guaranteed amount as sole or principal debtors.

[33] The plaintiff drew the court's attention to the following:

- (a) that the third defendant himself is an advocate and solicitor and in practice for approximately 21 years and:
 - (i) in the course of his legal practice, he handled housing loans which involved a lot of assignments;
 - (ii) that since he predominantly did bank works, conveyancing and loans during his years of practice, he is familiar with term loans, overdraft facilities, guarantees and assignments;
- (b) that the third defendant made the following admissions during his testimony which according to the plaintiff are significant:
 - (i) that he executed the guarantee;
 - (ii) that the guarantee to be given for the facility is to be given to the lender;
 - (iii) that his position prior to the filing of the plaintiff's action, is that he believed that the guarantee is valid;
 - (iv) that prior to the filing of the plaintiff's action, he did not dispute the validity of the guarantee that he entered with the lender.

[34] The plaintiff submitted further that as the ultimate assignee, it is entitled to bring this action to enforce *inter alia*, its rights under the guarantee. It is the plaintiff's preliminary point that the benefit of a contract may be transferred to a third party by a process called assignment, a transaction between the person entitled to the benefit of the contract (called the creditor or assignor) and the third party (called the assignee) as a result of which the assignee becomes entitled to sue and the person liable under the contract (called the debtor). The debtor is not a party to the transaction and his consent is not necessary for its validity.

[35] The plaintiff cited s. 4(3) of the Civil Law Act 1956 which is the law that governs statutory assignments. The said section lays down conditions for effecting absolute assignments which are as follows:

- (i) that the assignments must be in writing under the hand of the assignor;

- A (ii) that the assignment must be absolute and not by way of charge only;
(iii) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

B [36] *UMW Industries (1985) Sdn Bhd (Formerly UMW (Malaya) Sdn Bhd) v. Ah Fook @ Chin Kim Fook* [1996] 1 CLJ 379; [1996] 1 MLJ 365 was cited by the plaintiff in support of its' contention that if the assignment fulfils all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

C [37] According to the plaintiff since s. 4(3) of the Civil Law Act 1956 refers to term "chose in action" it describes rights which could be asserted only by bringing an action and not by taking possession of a physical thing (Treital, *The Law of Contract*, 11th edn, p. 672) and the effect and ambit of the assignment must be considered from the four corners of the relevant documents constituting the assignment (*Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268 is cited). The plaintiff further submitted that the purpose of giving of the notices of assignment is for the protection of the assignee himself as otherwise, if notice is not given, the assignee must give credit for any payment made to the assignor by the debtor (*Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369 at p. 381 of the report).

F [38] The plaintiff highlighted that in this case firstly, there was the sale and purchase agreement (between the lender and Idaman Capital) and subsequently the deed of assignment (between Idaman Capital and the plaintiff). The two documents provided for absolute assignments resulting in the rights, etc under the facility agreement and the guarantee being ultimately assigned to the plaintiff. Notices of the assignments were given to the borrower and the guarantors including the third defendant. The third defendant undertook to pay all the monies payable in accordance with the guarantee to the designated bank account or in accordance with the instructions of the plaintiff. Therefore according to the plaintiff, the conditions under s. 4(3) of the Civil Law Act 1956 have been fulfilled, thereby, passing and transferring the legal right to the monies due and owing by the borrower and the guarantors, including the third defendant, to the plaintiff and all legal and other remedies for the same.

H [39] In the circumstances, the plaintiff submitted that it is entitled to make a demand on the amounts due and owing from the borrower and the guarantors, including the third defendant under the facility agreement and the guarantee respectively and to commence this action for recovery for the amount due and owing.

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[40] The position of the plaintiff is that the lender has the capacity to enter into the guarantee with, among others, the third defendant. The plaintiff submitted that cl. 4.1 of the facility agreement does not confer any right, title or interest on the lender but instead refers to conditions precedent for the availability of the facility. Upon the conditions precedent being satisfied, the facility is available to the borrower (that is, the borrower obtains a right to the facility) and the lender comes under an obligation to make the facility available to the borrower. The nature of the above conditions precedent is therefore to suspend the availability of the facility until the conditions precedent are satisfied. If not, no liability arises to either party. Condition precedent according to the plaintiff is not a right or interest which can then be assigned. In short, the assignment of rights, etc, to Idaman Capital and subsequently to the plaintiff did not have any impact on the conditions precedent to the availability of the facility. These conditions precedent according to the plaintiff needed to be satisfied and it was one of the conditions precedent for the provision of the related security (that is the guarantee in favour of the lender) and further the guarantee was executed before the closing date.

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[41] The plaintiff submitted that the third defendant is estopped from challenging the capacity of the lender to enter into the guarantee and contending that the guarantee is invalid. The obligation to repay has now come for the third defendant as a guarantor for the borrower as the full benefit of the facility has been obtained by them. The plaintiff stated that the third defendant is obliged to honour the guarantee as well as his direct undertaking in the letter of 3 October 2006 to the plaintiff to pay as instructed by the plaintiff.

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The Defendant's Case

[42] The third defendant pleads that at the time of the alleged sale and assignment of the transferred assets on 19 September 2006, the guarantee which was signed on 3 October 2006 was yet to be given. It is the defendant's contention that when the third defendant signed the guarantee with the lender on 3 October 2006, the lender did not have any rights and interest in the facilities agreement to be guaranteed by the defendant. The defendant further stated that the lender was not the party that could sign the guarantee with the third defendant.

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[43] It is the third defendant's position that in this case, the plaintiff needs to show that the guarantee is not void *ab initio* since at that time the lender signed the guarantee on 3 October 2006 the lender had already assigned absolutely all its rights to the facilities agreement to the issuer, who in turn assigned all its rights to the plaintiff on 19 September 2006. The defendant submitted that at the time of execution of the guarantee on 3 October 2006, the lender does not have any rights or interests in the facilities agreement to

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- A be able to give any consideration to the third defendant as guarantor. According to the third defendant by assigning absolutely its rights in the facilities agreement, the lender had also assigned its right to obtain the related security under the facilities agreement, which right is expressly stipulated in cl. 5.1 of the facilities agreement. The related security according to the third
- B defendant is described as the joint and several guarantee by Mohd Amran, the second and third defendant (Schedule 2, facilities agreement). It is the third defendant's case that it is clear under the facility agreement it is the right of the lender to obtain the guarantee and the obligation of the borrower to provide or cause the guarantee to be given to the lender. Therefore by the
- C absolute assignment, the lender according to the third defendant has given up all its rights to the guarantee (as it was yet to be obtained) on 19 September 2006. Upon assigning absolutely its rights under the facility agreement, the lender therefore does not have the capacity, since it does not have rights under the facility to get the guarantee from the third defendant.
- D **[44]** It was the third defendant's argument that no condition precedent set out in the facilities agreement for the purpose of validating the agreement as cl. 1.1 of the facilities agreement made no mention of conditions precedent in the definition clause. It was the third defendant's contention that plaintiff's alleged 'condition precedent' for the lender to obtain the related security is
- E but a red herring that draws the court away from the determination of whether the absolute assignment by the lender, once perfected by the notice of the said assignment to the borrower on 19 September 2006, must necessarily mean the lender has no longer any rights in the facility agreement when the guarantee was signed on 3 October 2006. The third defendant
- F submitted that whether the lender still had or no longer had the right to obtain the guarantee on 3 October 2006, turns upon the interpretation of the terms in the facilities agreement regarding the obtaining of the related security.
- G **[45]** The third defendant further submitted that the deed of assignment only deals with the absolute assignment of right and not the obligations of the lender. The defendant stated that in the instant case, the lender has the right to obtain the guarantee and the borrower the obligation to provide the guarantee. According to the third defendant, by assigning its rights absolutely to the issuer, Idaman Capital under the sale and purchase agreement, the lender has given up its rights to obtain the guarantee to Idaman Capital but
- H however, it remains an obligation on the part of the lender to release the loan sum to the borrower and that it must do when the lender is given the guarantee. The third defendant took the position that even if the lender were somehow have residual rights to enter into the guarantee, the guarantee by the third defendant of the first defendant's payment obligation could not be
- I given to the lender; it must be given to the plaintiff as the ultimate beneficiary or to the issuer as the immediate beneficiary of the assigned facility agreement.

Findings Of The Court

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[46] Essentially there were two grounds by which the third defendant was relying upon in opposing the plaintiff's claim:

- (i) that the guarantee of the 3 October 2006 ("guarantee") is void *ab initio* as the lender, Alliance Bank Bhd ('the lender') has no capacity to enter into the guarantee at the material time with the third defendant as the lender has assigned all its rights under the facilities agreement dated 19 September 2006 with the borrower.

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- (ii) that the third defendant should have been released as the guarantor.

[47] The benefit of a contract may be transferred to a third party by assignment by virtue of s. 4(3) of the Civil Law Act 1956. Section 4(3) of the Civil Law Act 1956 states:

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Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of a charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

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[48] In the context of the present suit, effectively the plaintiff has two assignments, ie, the sale and purchase relating to the issuance of the bonds and subsequently the deed of assignment with Idaman Capital. The plaintiff's case is that it has the right under the facilities agreement and subsequently under the guarantee. The third defendant on the other hand contended that as the sale and purchase which assigns the right of the lender to Idaman Capital and subsequently by the deed of assignment assigned to the plaintiff was executed on 19 September 2006, the lender has no capacity or ability to enter into the guarantee which was signed on 3 October 2006. In other words, the third defendant argued that by virtue of the assignment, all rights have been taken away from the lender and therefore the lender has no more right to enter into the guarantee.

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[49] This court's attention has been taken extensively and in detail as to all the important clauses in the facilities agreement *vis-à-vis* the guarantee. Obviously the guarantee is the related security to the facilities. Clause 4.1 lays down the fact that the guarantee is the condition precedent to the availability of the facility. Clause 4 of the facility agreement states as follows:

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A 4. AVAILABILITY

4.1 Conditions Precedent: The Facility shall become available to the Borrower on the date the Lender has received the documents and evidence listed in Schedule 3 in each case in the form and content satisfactory to the Lender.

B 4.2 Waiver of conditions precedent: The conditions precedent set out in Schedule 3 hereof are inserted for the sole benefit of the Lender and may be waived by the Lender in whole or in part with or without terms and conditions without prejudicing (a) any of the rights of the Lender under this Agreement; and (b) the right of the Lender to terminate or suspend at its absolute discretion, the disbursement or utilisation of the Facility pending the satisfaction of the Conditions Precedent set out in Schedule 3.

C [50] From the reading of cl. 4.1 this court found that it does not envisage rights but rather a condition precedent in order for the facilities to be disbursed. The lender will have to set out the terms to be fulfilled without which no facilities will be given.

D [51] Further, cl. 15.1 of the facility agreement stated that there is an obligation on the borrower to cause the execution of the security. Clause 15.1 of the facility agreement states:

E 15. SECURITY (IF APPLICABLE)

15.1 Execution of security documents in relation to the Related Security: If applicable, for the purpose of better securing the payment and repayment of the Facility, interest thereon and all other monies due and owing under the Facility and this Agreement, the Borrower shall simultaneously with the execution of this Agreement, shall execute and/or shall cause (if applicable) any security party, to execute (if applicable) the security documents in relation to the Related Security.

F [52] This court is of the considered view that cl. 15.1 in actual fact imposes an obligation and again it does not talk about rights of the lender. When there are conditions precedent to be fulfilled, it is about obligations and not rights. Conditions precedent denotes that something must be done before some other things occur. Reading the facilities agreement as a whole, it can be seen that the agreement has been categorised in such a way that it is not about right but a condition precedent to be fulfilled first before the right to the facilities can be obtained.

G [53] Contrary to the third defendant's contention, there is a consideration that flows from the lender as a result of the assignment. The guarantee itself contemplates that the consideration is the disbursement of the facilities to the lender. Once the condition is satisfied, the facilities agreement will allow the issuance of the drawing notice by the borrower and it was proven that after the facilities agreement and the guarantee were signed the money was

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disbursed. There is nothing in the facilities agreement to state specifically there is a right for the lender to get the guarantee but rather the guarantee is a condition precedent. In the event the conditions precedent are not satisfied, no liability arises to either party.

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[54] *Anson's Law of Contract* 27th edn explained at pp. 133 to 135 as follows:

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... A condition is therefore normally a 'promissory' condition, that is to say, the breach of it entitles the innocent party to be released from further performance of the contract and to be compensated by damages.

Alternatively, and exceptionally, however, a condition may be a 'contingent' condition. For instance, it may be provided that a contract shall not take effect unless or until the condition is fulfilled or that a particular duty under the contract does not become due unless or until the condition is fulfilled or that a particular duty under the contract does not become due unless or until the fulfilment of the condition. The existence or enforceability of the contract or the particular obligation is dependent upon the fulfilment of the condition, but there is no guarantee or promise that it will be fulfilled.

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Alternatively and exceptionally, however, a condition may be a 'contingent' condition. For instance, it may be provided that a contract shall not take effect unless or until the condition is fulfilled or that a particular duty under the contract does not become due unless or until the fulfilment of the condition. The existence or enforceability of the contract or the particular obligation is dependent upon the fulfilment of the condition, but there is no guarantee or promise that it will be fulfilled.

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The distinction between promissory conditions and the first type of contingent condition was illustrated by Denning L.J. in *Trains Trust SPRL v. Danubian Trading Co. Ltd.* when considering a stipulation in a contract of sale of goods which related to the opening by the buyer of a letter of credit in favour of the seller:

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What is the legal position of such a stipulation?. Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from further performance of the contract and can sue the buyer for damages for not providing the credit.

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This does not, however, take account of the situation in which the stipulation operates to qualify not the contract but the particular obligation but is never the less contingent. The examples below show that the insertion of a contingent condition may produce one of several effects.

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- A First, it may prevent the formation of any immediately binding contract, as in *Pym v. Campbell* where the parties entered into an agreement for the sale and purchase of part of the proceeds of an invention on the express oral understanding that it should not bind them until a third party approved the invention. In such a situation, either party may withdraw from the transaction at any time before the condition is fulfilled.
- B Secondly, one party may assume an immediate unilateral obligation, say, to sell or to buy land or goods from the other, but subject to a condition. In this case, there is a contract from the start imposing a unilateral obligation from which one party cannot withdraw, but no bilateral contract of sale, binding on both parties, comes into existence until the condition is fulfilled. Many options in leases and hire purchase agreements are of this nature, in such cases the fulfilment of the condition depends on the will of the option holder.
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- D Thirdly, the parties may enter into an immediately binding contract, the operation of which is suspended pending fulfilment of the condition. So, for example, if a husband and wife enter into a maintenance agreement 'subject to the approval of the Court', this is a contract from which neither can resile until it can be definitely ascertained that the condition will not be fulfilled. Alternatively, while the operation of the contract is not suspended, that of a particular obligation under it is. Thus, the obligation of an insurer to pay does not arise until the occurrence of the loss.
- E In none of these situations, however, does either party render itself liable in damages to the other in the event of non-fulfilment of the condition. Even if, as is often the case, the Court is prepared to imply a term that one of the parties will use all reasonable endeavours to secure fulfilment of the condition, as for example, where a sale of land is conditional upon planning permission being obtained, or goods are sold subject to an import or export licence, the fact that the condition is contingent, and not promissory, will prevent any liability from arising if that party's reasonable endeavours prove unavailing.
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[55] *Black's Law Dictionary*, 7th edn defines rights as below:

- G A legally enforceable claim that another will do or will not do a given act.

Whilst interest in turn is define as;

A legal share in something; all or part of a legal or equitable claim to or right in property.

- H [56] Therefore, a condition precedent is not a right or interest which can be assigned and in this case, the assignment of rights to Idaman Capital and subsequently to the plaintiff does not have any effect on the conditions precedent to the availability of the facility. The conditions precedent must be satisfied first and it was one of the conditions precedent for the provision of the related security that is the guarantee in favour of the lender. The third
- I defendant admitted this in his evidence:

JM : What is the condition precedent that's required?

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ABK : Condition Precedent 1 is regarding the execution on stamping of the documents and it reads: "This agreement and (if applicable) the security documents in relation to the Related Security in respect of the Facility shall have been duly executed and stamped or duly endorsed as exempted (where applicable)".

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JM : Alright. And this Related Security, will it be the guarantee that you signed?

ABK : I believe so, yes

JM : So it was a condition precedent for the availability of the Term Loan that the guarantee that you signed be given?

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ABK : It would seem so in the Facility Agreement.

JM : Right. And the guarantee that you are to give is a guarantee to be given to Alliance Investment? Is that correct?

ABK : Yes, that was the guarantee I signed.

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JM : What is the effect of not giving such a guarantee? *Vis-à-vis* the Term Loan Facility? If you don't give the guarantee what happens to the Term Loan Facility?

ABK : My guess would be that the Facility will not be disbursed.

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JM : Back to page 28.

ABK : Yes.

JM : Doesn't it clearly say that the Facility shall become available if the conditions precedent are satisfied?

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ABK : Yes, it says so.

JM : So it's not your guess.

ABK : No, it's not. It says so.

JM : That is the condition precedent?

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ABK : Yes I would agree.

[57] The third defendant further referred to the definition of "Related Security" in the facility agreement and contends that the definition supports the position of the third defendant that the lender has a right to obtain the guarantee. On that basis, the third defendant contended that by the absolute assignment, the lender has given up its rights to obtain the guarantee. Related security is defined in the facility agreement as follows:

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with respect to the Facility, unless as specifically stated in Section 8 of Schedule 2, all the Lender's rights, title and interest in, to and under:

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- (a) any debenture, land charges, assignments, other security interest or liens and property subject thereto from time to time, if any, securing payment of the Facility, whether pursuant to this Agreement or otherwise;

A (b) all guarantees, promissory notes, warranties, insurance (and proceeds thereof), performance bonds or other agreements, instruments or arrangements of any kind from time to time supporting or securing payment of the Facility, whether pursuant to this Agreement or otherwise;

B (c) all proceeds of any of the foregoing.

[58] The above definition of related security provides the range of securities and the rights of the lender under any particular security. The rights under any particular security only arise upon the provision of the security and not before. The provision of the guarantee is therefore a condition precedent and upon the guarantee provided, rights under the guarantee then will arise. The rights then are assigned finally to the plaintiff.

[59] Under the facility agreement, in the event the guarantee is not executed, one of the conditions precedent for the availability of the facility to the borrower is not satisfied. The conditions precedent as stated in the earlier paragraphs, are provided in cl. 4.1 read with Schedule 3 of the facility agreement. The effect of non-compliance with the conditions precedent is that the facility does not become available to the borrower. This court agrees with plaintiff's learned counsel's submission that if the third defendant is correct in saying that the obtaining of the guarantee is a right conferred on the lender, then, bearing in mind the meaning of the word "right" (which means a legally enforceable claim that another will do or will not do a given act – as defined by *Black's Law Dictionary* 7th edn cited in the earlier paragraphs), the lender can take legal action to compel the borrower to cause the execution of the guarantee. In contrast to the third defendant's submission, the terms in the facility agreement do not contemplate that sort of cause of action. The facility agreement and in particular cl. 4.1 provides that in such a situation, the facility is not made available to the borrower. It is a norm that no lender will take legal action to compel a security to be given. What the lender would normally do is to stop from disbursing the facility until such security is rendered. The third defendant and the plaintiff's first witness accepted this situation. The third defendant stated in his evidence produced in the earlier paragraphs whilst the plaintiff's first witness stated:

JM : If I could take you to Clause 4 which you referred to during your examination. Can I just read it?. "The Facility shall become available to the Borrower on the date the Lender has received the documents and evidence listed in Schedule 3 in each case in the form and form and content satisfactory to the Lender".

Can I now then take you to Schedule 3 which you again referred to during cross, Schedule 3 which is at page 53 of the same Bundle.

And you look at the first paragraph of Schedule 3, Execution and Stamping of documents. This agreement and (if applicable) the security documents in relation to the Related Security in respect of the Facility shall have been duly executed and stamped or duly endorsed as exempted (where applicable).

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Ms Kung, what actually is the effect of Clause 4 read together with Schedule 3 of the Facility Agreement?

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KSI : The effect is that if the condition!, the one that you just read is not met, the loan will not be disbursed. That means conditions precedent are not met and therefore the loan will not be available.

JM : And in the the context of this particular loan, what was the related security?

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KSI : Joint and several guarantee from the 4 individual guarantors, Yang Arif.

JM : And based on the answer that you just gave, if the guarantee that was to be provided was not provided, the facility will not be available?

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KSI : That is correct, Yang Arif .

[60] It is therefore patently clear that the third defendant cannot challenge the capacity of the lender to enter into the guarantee and its' validity. The terms of the facility agreement in particular cl. 4.1 read together with Schedule 3 show that the conditions precedent do not take the form of a right or confer a right upon the lender. Sir Kim Lewison in his book *The Interpretation of Contracts*, 5th edn stated at p. 725 under the heading "Conditions Precedent" as follows:

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A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it or an obligation under it until fulfilment of the condition; or to describe a contractual obligation that must be performed by one party before another contractual obligation of the counter-party arises.

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At p. 727, it is further stated:

The expression "condition precedent" is also used to describe a contingency which must be fulfilled in order to bring a particular contractual obligation into operation.

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[61] The assignments do not impact the operation of the conditions precedent and those conditions precedent are required to be performed and accordingly the lender has the capacity to enter into the guarantee.

[62] This court accepts the plaintiff's submission that consistent with his approximately of 21 years as a practising lawyer and subsequently appointed as the head of the Offshore Works Holdings Sdn Bhd's Group Legal and Corporate Division (Offshore Works Holdings Sdn Bhd is the holding

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A company of the Borrower), the third defendant must be familiar with, among others, with guarantees and assignments. He was a director of the borrower and he is fully aware of the terms of the facility agreement, *inter alia* the following terms of the facility agreement:

(i) Recitals (C) and (D) in the facility agreement which provides as follows:

B (C) The Lender is desirous of selling, transferring and assigning all the Lender's rights, title and interest in this Agreement and the Other Facility Agreements including the Lender's rights, title and interest to the loan proceeds and (if applicable) together with the Related Security (collectively, the "Transferred Assets") to the
C Issuer, a special purpose company specially incorporated to issue asset-backed securities, namely, the Bonds (as hereinafter defined), pursuant to a primary collateralised loan obligations transaction (the "Primary CLO Transaction").

D (D) The sale, transfer and assignment of the Transferred Assets by the Lender to and in favour of the Issuer shall be evidenced by a sale and purchase agreement to be entered into between the Lender as vendor and the Issuer as purchaser (the "Sale and Purchase Agreement") upon the terms and subject to the terms therein contained.

(ii) Clause 16.7 of the facility agreement which provides as follows:

E Assignment to the Issuer. Without prejudice to the foregoing, the Borrower hereby agrees and consents to the sale, transfer and assignment by the Lender as vendor of all the Lender's rights, title and interest under the Facility and (if applicable) the Related Security to the Issuer as purchaser to enable the issuance of the
F Bonds by the Issuer pursuant to the Primary CLO Transaction.

[63] This court agrees that the defendants including the third defendant knew all along what was going to happen prior to the signing of the agreement, the consequences thereafter, the factual matrix leading to the giving of the guarantee and that the lender's rights under the guarantee would be assigned. All parties knew that there will be a facilities agreement and a sale on the right to facilitate the bond issue and the sale will encompass the security obtained. Knowledge on the part of the third defendant that the guarantee once obtained will enable the rights to the facilities be transferred to the plaintiff is proven by virtue of the Circular Resolution of the Board of Directors (which includes the third defendant). The RECITALS of the
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H Directors' Circular Resolution dated 23 August 2006 states:

RECITALS

I (A) As the request of the Borrower, the Lender has agreed to make available to the Borrower, a loan facility of up to the maximum aggregate principal amount as stated in Section 1 of Schedule 2 hereto (the "Facility")

- (B) The Lender has also agreed to make available loan facilities (the “Other Facilities”) to certain other companies respectively, upon the terms and subject to the conditions contained in the relevant facility agreements (the “Other Facility Agreements”) respectively. A
- (C) The Lender is desirous of selling, transferring and assigning all the Lender’s rights, title and interest in this Agreement and the Other Facility Agreements including the Lender’s rights, title and interest to the loan proceeds and (if applicable) together with all Related Security (collectively, the “Transferred Assets”) to the Issuer, a special purpose company specially incorporated to issue asset-backed securities, namely the Bonds (as hereinafter defined), pursuant to a primary collateralised loan obligations transaction (the “Primary CLO Transaction”). B C

[64] The third defendant acknowledged receipt of the notice of assignment dated 3 October 2006 giving notice of the assignment of, *inter alia*, of the rights, etc, of the lender under the guarantee to Idaman Capital (letter of acknowledgement dated 3 October 2006). By another letter of 3 October 2006, the third defendant subsequently consented to the assignment of, *inter alia*, the rights under the guarantee from Idaman Capital to the plaintiff and specifically undertook to pay all the monies payable or due to be paid in accordance with the guarantee to the designated account or in accordance with the written instructions of the plaintiff. The third defendant then signed the drawing notice for the drawdown of the facility. Confirmation was given in the drawing notice that the conditions contained in cl. 4.1 of the facility agreement (which includes the provision of the related security, ie, the guarantee) are satisfied. By the drawing notice, the facility of RM32,000,000 was disbursed. In his evidence, the third defendant did not dispute the validity of the guarantee that he entered with the lender. D E F

[65] The entire transaction was premised on the fact that the guarantee will be given to the lender as condition precedent for the facility to be given and not as right. The most glaring part of the entire scenario is that the conduct of the parties in particular the third defendant whom the court found had acted upon the guarantee being a condition to the facilities which the company later had benefited. After signing the guarantee and being in a position of exclusive knowledge as to what has transpired, the third defendant is not in a position to question the enforceability of the guarantee now. He in fact executed resolution which sets out the background leading to the borrowing. Together with the other defendants, he was notified of and acknowledged the assignment. Just as important the consent to the assignment was also given whereby the third defendant undertakes to pay the facilities. G H

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- A [66] This court agrees with the submission of the learned counsel for the plaintiff, that the third defendant is estopped from raising the defence proffered in this present suit. In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283, there were contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon an erroneous assumption of law that the factoring agreement was indeed a good and valid assignment. The Federal Court addressed the issue as follows:

- C We now turn to address our minds to the second argument of Encik Naban to the effect that the Factoring Agreement entered into between the respondent and Chemitrade was not an assignment at all. In support of this argument, Counsel relied upon the judgment of Zakaria Yatim J (as he then was) in *Arab-Malaysian Merchant Bank Bhd v. Esso Production Malaysia Inc.* [1992] 2 CLJ 989 (refd) Having read the judgment in that case (which dealt with an agreement in terms identical to the Factoring Agreement in the instant appeal) we are left in doubt as to the correctness of the decision. But we need not, because of the facts of the present case, go into that question in great detail.

- E In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption - an erroneous assumption of law - that the Factoring Agreement was indeed a good and valid assignment. The respondent's letter to the appellant of 14 February 1990, which we have earlier reproduced, is a document in point. *The letter says that there has been an assignment under the Factoring Agreement. It was open at that stage for the appellant to dispute the construction which the respondent placed upon that Agreement. But it did not do so. Instead it chose to go along with the respondent's interpretation of the document. Can it now say otherwise? We do not think it can. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document".* (emphasis added)

- F [67] In dealing in detail on the law of estoppel, the Federal Court stated:

- G The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

- H Edgar Joseph Jr. J. (as he then was) in an illuminating judgment in *Templeton v. Low Yat Holdings Sdn. Bhd.* [1989] 1 CLJ 693; [1989] 2 MLJ 202, 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act, 1952.

- I The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA. 203; *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] QB 84. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see,

Commissioner For Religious Affairs, Trengganu v. Tengku Mariam binti Tengku Sri Wa Raja [1970] 1 LNS 21[1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 1 WLR 1002. It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case (*supra*)) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *The American Surety Co of New York v. The Calgary Milling Co Ltd* [1919] 48 DLR 295; *De Tchiatchef v. The Salerni Coupling Ltd* [1932] 1 Ch. 330; *Taylor Fashions* (*supra*).

We would add that it is wrong to apply the maxim “estoppel may be used as a shield but not a sword” as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100, 108:

Estoppel is not a cause of action.

It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey and The Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

[68] From the above excerpts, it could be gleaned that the Federal Court recognised that plaintiffs too may have recourse to the doctrine of estoppel in that it may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. The Federal Court further stated:

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at page 122) as follows:

The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment.

A It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.

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[69] The third defendant further contended that PW1, a partner in Messrs Zul Rafique & Partners who was involved in the drafting and preparation of the facility agreement contradicted in her evidence regarding how assignments under the law must be absolute as nature and said the lender has the right to obtain the guarantee based on “closing date” and “the condition precedent”. The court agrees with the learned plaintiff’s submission that there is no contradiction in PW1’s evidence. PW1 admitted the lender’s right to insist that the guarantee be provided because it was a condition precedent for the availability of the facility. At p. 30 of the notes of proceedings PW1 answered the question posed by the learned counsel for the third defendant as follows:

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AO : Does it mean that Alliance has the right to call upon Offshore Works to provide the security under the terms of the Agreement under the terms of these conditions precedent? The right. Just now I asked you about the obligations so you said it is not for Alliance Bank to provide. So now I am asking you do they have the right to insist that this guarantee be given?

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G KSI : Yes, they do.

Therefore, PW1’s answer must be viewed in the context of the question posed. PW1 agreed that assignment under the law has to be absolute but the conditions precedent must be fulfilled first and the lender has the right to obtain as such.

H [70] PW1 was also asked as to the subscription of the Subordinated Bonds where the witness answered that it will be a condition of the borrower to subscribe. The court found that as a matter of fact the clause in relation to the subscription of the Subordinated Bonds is a promissory condition and is not part of the conditions precedent to the availability of the facility. It is in

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fact an obligation imposed on the borrower to subscribe for it in the manner as provided. *Anson's Law of Contract* 27th edn discussed the distinction between a promissory condition and a condition precedent as follows:

A condition is therefore normally a 'promissory' conditions, that is to say, the breach of it entitles the innocent party to be released from further performance of the contract and to be compensated by damages.

Alternatively, and exceptionally, however, a condition may be a 'contingent' condition. For instance, it may be provided that a contract shall not take effect unless or until the condition is fulfilled or that a particular duty under the contract does not become due unless or until the fulfilment of the condition. The existence or enforceability of the contract or the particular obligation is dependent upon the fulfilment of the condition, but there is no guarantee or promise that it will be fulfilled.

[71] An absolute assignment of right does not impact the continued operation of the conditions precedent clause. This court found that there is no contradiction in the evidence of PW1 when she stated that the lender retains the right to obtain the guarantee since the provision of the guarantee is part of the conditions precedent to the availability of the facility. This court further found that the guarantee was obtained prior to the closing date of the sale and purchase agreement and therefore, the lender was entitled to enter into the guarantee as the guarantee was part of the conditions precedent to the availability of the facility and therefore, was not a right that was assigned under the sale and purchase agreement and subsequently under the deed of assignment.

[72] Apparently, following disputes with the then Managing Director, the third defendant proposed to leave the Offshore Group of companies, dispose of his shares and required *inter alia* his release from all his guarantees, including the guarantee. There were series of requests by the first defendant for the release of the guarantors including the third defendant. An agreement was reached for the payment of six monthly instalments of RM608,000 each to the plaintiff for the release of the third defendant from the guarantee. Three monthly instalments of RM608,000 each totalling RM1,824,000 were paid to the plaintiff towards the release of the third defendant from the guarantee. However the remaining three monthly instalments were not paid to the plaintiff as the planned exit of the third defendant as a shareholder did not materialise. Ultimately the third defendant was never released from the guarantee.

[73] Nonetheless, what is apparent from the event was that when the company requested for the release of the third defendant as guarantor it proves that effectively the directors recognised that the company has a valid guarantee. The recent document relating to the 176 scheme ie, the joint affidavit of the group of companies including the first defendant compounded the findings of this court that the guarantee was given all this while by the

A third defendant. For the third defendant to question the validity of the guarantee and to allow him to now challenge the meaning which the parties gave to all the related documents would be unjust and unconscionable. In this regard the law must lean in favour of upholding bargains and not in striking them down. The third defendant upholds his bargain by complying with his contractual obligations. He cannot be allowed to avoid his liability under the Guarantee. In *Sarah Sayeed Majangah & Anor v Lembaga Getah Malaysia & Anor* [2016] 2 CLJ 905, the Court of Appeal stated:

[6] In our view, there was a misdirection when Her Ladyship failed to appreciate and apply the well settled principles based on a long line of authorities which say that:

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- (i) The law leans in favour of upholding bargains between the parties and not in striking them down; and
 - (ii) When it relates to sale and purchase agreement, lease agreement or tenancy agreement, etc. where the terms and conditions relating to the essential terms are standard in nature, the court will not permit a party who had subscribed to the term to evade to conclude the agreement for circuitous reasons. The court often forgive the technical shortcomings to conclude the agreement and this is often called a leaning in favour to uphold the bargain. Support for the proposition is found in a number of cases. (See (i) *Sejati Education Sdn Bhd v. S3M Development (Sabah) Sdn Bhd* (S-02-1282-08/2014); (ii) *Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors* [2005] 1 CLJ 416; [2005] 2 MLJ 32; (iii) *Hillas & Co Ltd v. Arcos Ltd* [1932] All ER Rep 494; (iv) *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327; (v) *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300).

F [74] On the plaintiff's claim for the amount due and owing, the court found that the amount disbursed to the borrower is the full amount under the facility namely, RM32,000,000 and not RM28,240,000 as contended by the third defendant. From the audited accounts of the borrower for the year ended 31 December 2006 the facility of RM32,000,000 is listed down as one of the term loans obtained by the borrower. Further, from the s. 176 affidavit of the borrower, (which is eight years after the facility was granted) confirms that the borrower admitted obtaining the full amount of RM32,000,000 under the facility. The acknowledgement of RM32,000,000 disbursed to the borrower can be seen from the calculation by the bank HSBC at p. 278 of Bundle B. The borrower was required to repay 5% of the advance at the end of three years and four years respectively from the date of advance. The borrower did repay RM1,600,000 which is 5% of the RM32,000,000 each at the end of the years prescribed (cl. 7.1 read with s.n 6 of Schedule 2 of the facility agreement).

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[75] According to the facility agreement, the disbursement of RM32,000,000 was stipulated as follows: **A**

(i) deductions from the subscription of the Subordinated Bonds by the borrower totalling RM32,000,000, being 10% of the facility (cl. 5.2 (b) read with cl. 5.3);

(ii) upfront payment of RM560,000 (cl. 14.3) through direct disbursement of the balance into the account of the borrower. This is for the balance sum of RM28,240,000 (Single Corporation Advice at p. 112 of Bundle A). **B**

[76] It was the third defendant's contention that the full amount or RM32,000,000 was not disbursed to the borrower. The third defendant stated that the subscription of the Subordinated Bonds by the borrower and further that the payment for the Subordinated Bonds did not come from the facility. **C**

[77] This court found that from cls. 5.2 (b) and 5.3, the Directors' Resolution, Recital (E) (iii), (iv) and Resolution 3, the subscription amount of the Subordinated Bonds in the sum of RM3,200,000 was deducted from the facility of RM32,000,000. Further, in accordance with the facility agreement, the lender also deducted the upfront payment from the facility of RM32,000,000 and disbursed directly into the account of the borrower, the balance sum of RM28,240,000. **D**

[78] From the audited accounts of the borrower for the year ended 31 December 2006 and the consolidated balance sheet of the borrower as at 30 November 2008 attached to the letter from the borrower to the plaintiff dated 20 February 2009, the borrower admitted that it owned Subordinated Bonds in Idaman Capital of RM3,200,000. In any event, the borrower has admitted in its audited accounts for the year ended 31 December 2006 and the s. 176 affidavit that it had obtained the full amount of the facility of RM32,000,000, which in the considered view of this court means that the facility was utilised in full and in accordance with the facility agreement which include the subscription for the Subordinated Bonds. **E**

[79] The plaintiff as the ultimate assignee has the legal right to the debt or chose in action and all legal and other remedies for the same by virtue of s. 4(3) of the Civil Law Act 1956. The issuance of the certificate on monies owing is part and parcel of the remedies held by the plaintiff for enforcing such rights assigned ie, the payments of the amount outstanding under the guarantee. Such certificate shifts the burden onto the third defendant to disprove the amount claim. **F**

[80] Further, this court found that from cl. 17.25 the borrower under the facility agreement has waived its rights of set-off in relation to monies payable under the facility agreement. By virtue of its' letter of 19 September **G**

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- A 2006 to the plaintiff, the borrower undertook to pay all monies payable or due to be paid in accordance with the facility agreement without any set-off or deduction or any payment to any other party, other than as provided under the terms of the facility agreement or in accordance with the instructions of the plaintiff. The third defendant under the guarantee agreed that all
- B payments by him under the guarantee whether in respect of principal, interest, fees or any item shall be made in full without any deduction or withholding, whether in respect of, among others, set-off, counterclaim, unless the deduction or withholding is required by law (cl. 18.2) and ultimately, by his letter of 3 October 2006, he undertook to pay all monies
- C payable or due to be paid in accordance with the guarantee without any set-off or deduction or any payment to any other party, other than as provided under the terms of the guarantee or in accordance with the instructions of the plaintiff which is to be notified in writing.

- D [81] As to the issue of Sukuk loan raised by the third defendant said to have been obtained and used to redeem the facility, the third defendant conceded that such loan was in fact not obtained by the borrower and instead obtained by Offshore Works Capital Sdn Bhd. No evidence was adduced showing any request for the utilisation of the Sukuk loan to redeem the facility. This court accepts the plaintiff's submission that if indeed the Sukuk loan was to redeem the facility, there was no reason to request for his release from the guarantee
- E and the other three guarantors to assume his obligation under the guarantee. As such the Sukuk loan issue is untenable.

[82] Lord Denning M.R. in *Amalgamated Property Co. v Texas Bank* [1982] 1 QB 84 concluded by stating as follows:

- F The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments; proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited
- G by a series of maxims; estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference
- H – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

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Conclusion

[83] On the facts of this case, the facility has been disbursed and enjoyed by the borrower. The third defendant was director of the borrower at all material time. After having obtained the full benefit of the facility, the third defendant upholds his bargain by complying with his contractual obligations. He is obliged to honour the guarantee as well as his direct undertaking in the letter to the plaintiff dated 3 October 2006 to pay as instructed by the plaintiff.

[84] Premised on the above, this court allowed the plaintiff's claim for the sum of RM33,743,864.58 including the outstanding principal amount of RM26,976,00 as at 1 May 2013 with interest thereon at the rate of 11.15% per annum on the said sum of RM33,743,864.58 to date of full payment. Costs of RM50,000 was awarded to the plaintiff.

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